

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 24, 2006 Session

GARY LYNN HIXSON v. CLIFTA JEAN (GOSS) HIXSON

Appeal from the Circuit Court for Hamilton County
No. 03D2308 W. Neil Thomas, III, Judge

No. E2005-01039-COA-R3-CV - FILED JUNE 19, 2006

In this divorce case, the Husband raises the sole issue of whether the trial court erred in granting the Wife alimony *in futuro* in the amount of \$1,000 per month. We hold that the trial court properly applied the pertinent statutory factors in making its determination, and that the evidence does not preponderate against the trial court's ruling. Therefore, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Don W. Poole, Chattanooga, Tennessee, for the Appellant, Gary Lynn Hixson.

Sandra J. Bott, Chattanooga, Tennessee, for the Appellee, Clifta Jean Hixson.

OPINION

I. Background

The parties were married on July 18, 1970. They have two children, both of whom were adults at the time of the divorce. On December 5, 2003, Gary Lynn Hixson filed his complaint for divorce. Clifta Jean Hixson answered and filed a counter-complaint. Following the trial of the case, the trial court entered its final decree declaring the parties to be divorced, dividing the marital estate, and ruling as follows:

The Court further finds, having considered all relevant factors contained in T.C.A. 36-5-101(d)(1) [now T.C.A. § 36-5-121(i)], that the [Wife] has met the statutory requirements for alimony in futuro which are contained in [T.C.A. § 36-5-121], specifically that the [Wife] is economically disadvantaged relative to the [Husband]; that

the [Wife] has been fully rehabilitated and is not capable of obtaining a lifestyle similar to that which the parties enjoyed during the marriage without the financial assistance of the [Husband] and further the [Husband] has the ability to provide said assistance.

Based on these findings, the trial court awarded Ms. Hixson alimony *in futuro* in the amount of \$1,000 per month.

II. Issues Presented

Mr. Hixson appeals, raising the sole issue of whether the trial court erred in awarding Ms. Hixson spousal support of \$1,000 per month. Ms. Hixson argues that this appeal is frivolous and that she should be awarded her attorney's fees.

III. Standard of Review

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations which we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are accorded no such presumption. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

Regarding an award of spousal support, this court has declared on numerous occasions that a trial court has broad discretion in determining the type, amount and duration of alimony, based upon the particular facts of each case. *Wood v. Wood*, No. M2003-00193-COA-R3-CV, 2004 WL 3008875 at *4, 2004 Tenn. App. LEXIS 877 at *12-13 (Tenn. Ct. App. M.S., Dec. 28, 2004) and cases cited therein; *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004). As an appellate court, we are disinclined to second guess a trial court's alimony decision unless it is not supported by the evidence or is contrary to public policies reflected in the applicable statutes. *Nelson v. Nelson*, 106 S.W.3d 20, 23 (Tenn. Ct. App. 2002).

IV. Analysis

Under T.C.A. § 36-5-121, once a trial court has determined a party to be economically disadvantaged relative to his or her spouse, the court must determine the nature, amount, duration, and manner of payment of an alimony award. *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn. 2003). As our Supreme Court has recently stated:

A trial court must consider every relevant factor in Tennessee Code Annotated section 36-5-101(d)(1) (2001) [now T.C.A. §36-5-121(I)] to determine the nature and extent of support. The two most

important factors considered are the need of the disadvantaged spouse and the obligor spouse's ability to pay. *See Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn.2001).

The legislature has demonstrated a preference for an award of rehabilitative alimony to rehabilitate an economically disadvantaged spouse. *See Crabtree v. Crabtree*, 16 S.W.3d 356, 358 (Tenn.2000). However, trial courts should not refrain from awarding long-term support when appropriate under the enumerated statutory factors. *Robertson*, 76 S.W.3d at 341-42. "The statutory preference for rehabilitative support does not entirely displace other forms of spousal support when the facts warrant long term or more open-ended support." *Anderton v. Anderton*, 988 S.W.2d 675, 682 (Tenn.Ct.App.1998).

Bratton v. Bratton, 136 S.W.3d 595, 604-05 (Tenn. 2004).

The statutory factors required to be considered by the trial court are set forth in T.C.A. § 36-5-121(i) as follows:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;

(9) The standard of living of the parties established during the marriage;

(10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

(11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and

(12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Applying these factors to the present case, the record supports the conclusion that the trial court did not err in awarding Ms. Hixson alimony *in futuro* in the amount of \$1,000 per month, and that the evidence presented does not preponderate against the trial court's findings.

Regarding Ms. Hixson's need for spousal support, she is employed as a music teacher in the Hamilton County school system. She testified that her gross income was \$2,758 per month, and that she also earned \$75 per week playing piano at her church. In 2003, Ms. Hixson grossed \$34,514.60 as a schoolteacher. Her income and expense statement filed as a trial exhibit showed a monthly deficit of \$1,218.47. Ms. Hixson testified that with the \$1,000 per month in alimony *pendente lite* ordered by the trial court prior to trial, "I have been able to pay all of the bills and – but if anything extra came up, I would have to borrow the money, usually from my parents."

Regarding Mr. Hixson's income and his ability to pay, he has worked in the insurance sales business for 34 years. His income, being based in part on commission, fluctuated over the years. In 1998, the parties' combined adjusted gross income was \$142,058, of which Ms. Hixson earned \$26,179. In 1999, their adjusted gross income was \$55,130, of which Ms. Hixson earned \$12,054. In 2000, their adjusted gross income was \$97,641, of which Ms. Hixson earned \$23,900. In 2001, their combined income was \$143,570; in 2002, it was \$91,458; and in 2003, \$111,248. Mr. Hixson testified that his projected income for 2004, based on the first 4.6 months, was approximately \$57,813.

After the parties separated, Mr. Hixson moved to Alabama and took a job as an insurance salesman. Prior to this move, he had been in a management position in the insurance business, so he expected to make less money in the new position. But regarding the move to Alabama, Mr. Hixson testified: "I would not have done that if I had thought I would take a pay cut long term. Any time you make a change, there is usually going to be a short-term pay cut." The trial court found that Mr. Hixson's "average income for the last four years has been \$65,000.00." We find that the evidence does not preponderate against the trial court's findings that Ms. Hixson is economically

disadvantaged relative to Mr. Hixson, that Ms. Hixson has need of spousal support, and that Mr. Hixson has the ability to pay.

Regarding statutory factor (2) above, the relative education and training of each party, Ms. Hixson has a college degree. She testified that she believed that her income had pretty much “peaked” in the public school system, and that other than cost of living allowance raises, she did not expect to have any increased earning capacity in the future. Mr. Hixson has a high school education and also “significant training in the field of insurance,” including years of management experience.

Regarding statutory factors (3), (4), and (5), the marriage lasted approximately 33 years. At the time of trial, Mr. Hixson was 55 years old and Ms. Hixson was 53. Mr. Hixson has some health problems, but there was no evidence presented that they impair his ability to be gainfully employed. Ms. Hixson is in generally good physical health.

Statutory factors (6), (7), (9), and (12) are inapplicable or not particularly relevant under the circumstances of this case. Regarding statutory factor (8), the marital estate was not of substantial value and the trial court divided it nearly equally between the parties. Neither party has appealed the trial court’s division of marital property in this case. Regarding statutory factor (10), Ms. Hixson worked at home, running the household and taking care of the children, until they reached adulthood.

Regarding statutory factor (11), relative fault of the parties, each party made allegations of the fault of the other, but the trial court did not make a specific finding of relative fault and we note in this regard that the trial court simply declared the parties divorced pursuant to T.C.A. § 36-4-129, rather than granting one of the parties a divorce.

Mr. Hixson’s argument that spousal support was inappropriate in this case is rooted in the assertion in his brief that “these parties, possibly more than any parties that have come before this Honorable Court, are very equal and this is not an appropriate case for alimony.” Our review of the record, particularly the relative earnings of the parties and potential for future earnings, does not support this assertion. The evidence does not preponderate against the judgment of the trial court. The trial court was within its wide discretion in awarding alimony *in futuro* of \$1,000 per month to Ms. Hixson.

V. Conclusion

For the aforementioned reasons, the judgment of the trial court is affirmed. Exercising our discretion, we decline to find this appeal frivolous and we hold each party is responsible for his or her own attorney’s fees on appeal. Costs of appeal are assessed to the Appellant, Gary Lynn Hixson.

SHARON G. LEE, JUDGE